IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1323

CAROL KINGDON FOSTER,

Petitioner,

vs.

GEORGIA PHILLIPS KINGDON,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

PAUL WEBB, JR.
DAVID E. BETTS
84 Peachtree Street, N.W.
Atlanta, Georgia 30303

BERTRAM S. BOLEY
1540 First National Bank Tower
Atlanta, Georgia 30303

Counsel for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

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CAROL KINGDON FOSTER,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF GEORGIA

The Petitioner, CAROL KINGDON FOSTER, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia rendered on November 23, 1976, and reaffirmed in a denial of a Motion for Rehearing on December 14, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia reversing the decision of the Superior Court of Fulton County, Georgia, is reported in 238 Ga. Rep. 37, and is appended in Appendix A, Infra, p. 1. The order of the Trial Court with its findings of facts and conclusions of law entered by the Superior Court of Fulton County, Georgia, is an unreported opinion and is appended hereto in Appendix A, pp. 5-16.

JURISDICTION

The opinion of the Supreme Court of Georgia was entered on November 23, 1976, and the Motion for Rehearing was denied by the Supreme Court of Georgia on December 14, 1976. This Court has jurisdiction pursuant to 28 U.S.C. §§1257(3), 2101(c), and Rule 22.3, Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

I. WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION PREVENTS A PERSON WHO HAS A PROPERTY INTEREST, WHICH IS AFFECTED BY A FOREIGN DIVORCE DECREE BUT WHO IS NOT IN PRIVITY WITH PARTIES TO THAT JUDGMENT, FROM CHALLENGING IN A SISTER STATE THE JURISDICTION OF THE RENDERING COURT (THE ISSUE OF JURISDICTION HAVING NEVER BEEN PREVIOUSLY FULLY AND FAIRLY LITIGATED.)

II. WHETHER THE LAWS OF THE STATE OF ALABAMA AUTHORIZE THE NULLIFYING OF A JUDGMENT WHEN IT COMES TO THE ATTENTION OF A COURT ASKED TO GIVE EFFECT TO THAT DECREE THAT THE JUDGMENT WAS RENDERED WITHOUT JURISDICTION AND AS A RESULT OF FRAUD AND COLLUSION BETWEEN THE PARTIES OBTAINING THAT JUDGMENT.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are Art. IV, Sec. I of the United States Constitution;

Amendment XIV, Paragraph 1 of the United States Constitution, and 28 U.S.C. §1738 (1948). These provisions appear in Appendix B, pp. 1-2.

STATEMENT OF THE CASE

This case arises out of a contest between the Petitioner and the Respondent over rights of inheritance involved in the Estate of FRED WILLIAM KINGDON, JR., who died a resident of the State of Georgia in September, 1974. Petitioner was the only child of the deceased. In connection with the proceedings in Probate, Petitioner challenged the validity of Respondent's marriage to the deceased on the grounds that Respondent was still lawfully married to one Harry Ragan Eidson, and consequently was without capacity to contract another marriage under the laws of the State of Georgia.

In response to that allegation, Respondent produced a divorce decree entered in the Inferior Court of Equity in Geneva County, Alabama, on July 27, 1961, purporting on its face to grant a divorce to her from Harry Ragan Eidson. Petitioner sought to impeach that divorce decree on the grounds that the Court in the State of Alabama lacked jurisdiction upon which to enter such decree, both parties to that action being residents of the State of Georgia at the time said decree was entered. The Trial Court found that the Respondent obtained the decree by traveling to the City of Roanoke, Alabama, and meeting with a lawyer on two separate occasions. The Trial Court also found that the Respondent

did not appear at the divorce proceedings in Geneva County, Alabama, nor did she ever travel to Geneva County, Alabama, to obtain the divorce. The Trial Court also found that all the proceeding papers were signed by the Respondent and her husband at an attorney's office located in the City of Roanoke, Alabama. The Court also found that the Petition for Divorce was filed in the Inferior Court of Equity in Geneva County, Alabama, on the 26th day of July, 1961, and the Final Decree was entered the following day.

Finding that the jurisdictional issue was never fully and fairly litigated in the State of Alabama (the Petition having been filed one day and the decree granted the next, and neither party having appeared before the Court), the Trial Court determined that the Alabama Court lacked personal and subject matter jurisdiction at the time of rendering the divorce judgment (neither party being domiciled in Alabama), and, consequently, the judgment was null and void and should not be given any effect under the Full Faith and Credit Clause of the United States Constitution.

The Supreme Court of Georgia reversed the decision of the Trial Court and ignored completely the non-adversary nature of the proceedings in Alabama. It held that collateral attack on the question of lack of jurisdiction could only be maintained if the laws of the State of Alabama authorize such a collateral attack on a decree. The Supreme Court of Georgia stated that the Full Faith and Credit Clause does not permit inquiry into jurisdiction by a sister state unless such

inquiry is authorized by the rendering state. The Court held (contrary to the findings of the Trial Court) that the State of Alabama does not authorize collateral attack on its judgments by strangers on the grounds of lack of jurisdiction over the person or subject matter.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Georgia committed error in its decision by ignoring the opinion of this Court and the line of cases cited therein dealing with full faith and credit found in Durfee vs. Duke, 375 U.S. 106, 84 S. Ct. 242, 11 L Ed2d 186 (1963), decided on December 2, 1963. In that case Mr. Justice Stewart stated that:

"However, while it is established that a Court in one State, when asked to give effect to the judgment of a Court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit - even as to questions of jurisdiction - when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

Durfee vs. Duke, supra, at 111.

The record in this case reveals that the question of jurisdiction was never fully and fairly litigated in the Inferior Court in Equity of Geneva County, Alabama. In fact, as the record reflects, the Petition for Divorce was filed on July 26, 1961, one day before the final judgment was rendered. There was no semblance of an adversary proceeding (the parties were not present and did not even know where or how the proceedings were occurring).

The opinion of the Supreme Court of Georgia from which this Petition of Certiorari arises is founded solely upon the proposition that the Alabama divorce decree cannot be collaterally attacked by the Petitioner because she could not have attacked that decree in the State of Alabama. Johnson vs. Muelberger, 340 U.S. 581, 71 S. Ct. 474, 95 L Ed 552 (1951) is relied on to sustain this proposition. It is the opinion of Petitioner that the Johnson case does not support the view announced by the Supreme Court of Georgia.

The Supreme Court of Georgia, in its opinion rendered on November 23, 1976, (rehearing denied on December 14, 1976) held that:

> "We conclude that the Alabama courts would not permit Mrs. Foster to now attack the 1961 judgment of its court; and the Full Faith and Credit Clause will, therefore, not permit such a collateral attack in the courts

> of this State."
>
> Kingdon vs. Foster, 238 Ga. 37 at 40 (1976).

What the Supreme Court of Georgia failed to consider was that the Full Faith and Credit Clause of the United States Constitution does not preclude inquiry into the question of jurisdiction if the sister state, wherein the judgment is attempted to be recognized, determines that the question of jurisdiction has never been fully and fairly litigated in the court which rendered the original judgment.[1]

Thus, the Supreme Court of Georgia in rendering its decision failed to follow decisions of this Court which have held that full faith and credit is to be accorded only when the jurisdiction of another state is not impeached either as to subject matter or as to person. Thompson vs. Whitman, 81 Wall. 457, (1874). See also: Williams vs. North Carolina, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577 (1945).

This Court has held repeatedly that a judgment can be enforced in a sister state:

> "...only if the court of the first

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1. Durfee v. Duke, supra; Milliken v. Meyer (1940), 311 U.S. 457, 61 S. Ct. 339, 85 L Ed 278. See also: 47 Am. Jur.2d, Judgments, p. 249, §1254; 50 C.J.S. Judgments §893, p. 497

State had power to pass on the merits -- had jurisdiction that is to render the judgment."

Williams vs. North Carolina, supra, at 229.

That is to say, the Court rendering the judgment must have jurisdiction.

Where a divorce is concerned, the power of the courts to grant decrees always, under our system of law, has been founded upon domicile. Andrews vs. Andrews, 188 U.S. 14, 23 S. Ct. 237 (1903); Bell vs. Bell, 181 U.S. 175, 21 S. Ct. 551 (1901). This court, interpreting the full faith and credit clause, has decreed certain standards of procedural due process to be observed before judgments changing the status of parties to a marriage may be accorded full faith and credit in a sister state. It seeks thereby to permit a state to vindicate its social policy against selfish action on the part of those outside its borders.

"The State of domiciliary origin should not be bound by an unfounded, even if not conclusive, recital in the record of a court in another State."

Williams vs. North Carolina, supra, at 230.

The Supreme Court of Georgia in rendering its decision failed to recognize those procedural due process standards which have been adopted by this Court.

Contrary to the apparent view of the Supreme Court of Georgia, the requirement of jurisdiction has not been changed. Even without the Durfee vs. Duke, supra, decision, Johnson indicates that the question of jurisdiction is not foreclosed from inquiry in the sister state unless that question has been previously fully and fairly litigated. As the language of Mr. Justice Reed demonstrates:

". . . the framers intended it [the full faith and credit clause] to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state full faith and credit in the sister states as they would have in the state of the original forum.

". . . It leaves each state with power over its own courts but binds litigants, wherever they may be in the nation, by prior orders of other courts with jurisdiction." [2]

(Emphasis added)

Obviously, jurisdiction is a legitimate matter of inquiry whenever the enforcement of a foreign judgment is sought. [3]

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[2] Johnson v. Muelberger, supra, at 584-585. See also: Cook v. Cook, 342 U.S. 126 at 128.

[3] See [1], Durfee, 375 U.S. at p. 114, note 12, 84 S. Ct. 342, citing Restatement, Conflict of Laws, §451(2), (Supp. 1948), and

Thus, where full faith and credit is claimed for a divorce decree in a sister state, inquiry is permitted into the authority to render that decree unless that issue has been previously full and fairly litigated. Only when there has been a true adversary proceeding in the rendering court can further inquiry be precluded; and the Full Faith and Credit Clause operates for the advancement of justice rather than for the perpetuation of a fraud.

The question presented in the case at bar is one of importance because of the necessity of adequately prescribing the effect in other states of judgments of sister states and for the adjustment of domestic relations laws of the several states as well as making certain that the Full Faith and Credit Clause of the United States Constitution is not used to perpetrate frauds on courts and third parties. If this Court denies certiorari and allows the decision of the Supreme Court of Georgia to stand, all litigants in the State of Georgia, as well as those in other State Courts which are persuaded by the reasoning of the Supreme Court of Georgia, will be foreclosed from impeaching a judgment which is impeachable under the decisions of this Court authorizing inquiry where the matter has not been previously fully and fairly litigated and where the decree affects a property interest of a litigant who is not in

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Restatement, Judgments, ch. 5, contemplates "Equitable Relief" for various reasons. Sec. 117 contemplates the granting of equitable relief from a void judgment which "appears or purports to be valid."

privity with parties to that judgment.

Further, Petitioner urges this Court to review this question where a true stranger to the decree, under challenge for lack of jurisdiction, has a property interest which is being affected by the foreign judgment. The previous decisions of this Court deal only with challenges by persons who were not strangers to the divorce proceedings, but rather were in privity with parties, or parties themselves, or aided in the obtaining of the divorce. Coe v. Coe, 334 U.S. 378 (1948) (a party); Sherrer vs. Sherrer, 334 U.S. 343 (1948) (a party); Davis vs. Davis, 305 U.S. 32 (1938) (a party); Johnson vs. Muelburger, supra (attack by children of party); Cook vs. Cook, 342 U.S. 126 (1951) (subsequent husband, but aided in obtaining divorce by paying cost of trip to Florida and part of legal expenses.) [4]

2. The decision of the Georgia Supreme Court is in conflict with the following State and Federal Court decisions:

Reinink vs. Reinink, 180 N.W.2d 57 (Mich. App. 1970);

Ratner vs. Hensley, 303 So.2d 41

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[4] See: Necessity for Domicile in Two Party Divorces, 52 Cd. L. Rev. 282, 283 (1953), which suggested that stranger means only persons whose property interests are not affected by the decree. As for property interest of Petitioner, see: In Re: Est. of Kant v. Kant, 272 So.2d 153 (S.C. Fla. 1973) at pp. 156-157.

[Fla. App. (1974)];

Podgorney vs. Great Central Ins. Co., 311 N.E.2d 640 (Ind. App. 1974);

Ford vs. Ford, 286 So.2d 385 (La. App. 1973);

Davis vs. Weht, 302 N.E.2d 382 (Ill. App. 1973);

Janes vs. Francesco, 295 A.2d 633 (N.J. 1972);

Staley vs. Staley, 248 A.2d 655 (Md. App. 1968);

Comprehensive Mechandising Catalogs, Inc. vs. Madison Sales Corp., 521 F.2d 1210 (7th Cir. 1975);

Topham vs. L.L.B. Corp., 493 S.W. 2d 461 (Ten. 1973);

Forman vs. Forman, 496 S.W.2d 243 (Tex. Co. App. 1973);

McCarthy vs. McCarthy, 276 N. E.2d 891 (Ind. App. 891);

Wheeler vs. Simmons, 206 So.2d 854 (Ala. 1968);

Leff vs. Leff, 102 Cal. Rep. 195 (Cal. App. 1972);

Abernathy vs. Chambers, 482 S.W. 2d 129 (Ten. 1972).

3. Decision of the Court below is erroneous and conflicting with the law of Alabama on the question of the ability of a court to nullify a judgment presented for enforcement when it comes to the attention of that court that the judgment was rendered without jurisdiction and obtained by fraud and collusion between the parties.

As pointed out by the Trial Judge, the most often cited expression of the Alabama Courts' ability to inquire into the validity of its decrees for lack of jurisdiction is the case of Hardigan vs. Hardigan, 272 Ala. 670, 128 So.2d 725 (1961). An examination of this case reveals precisely a situation analogous to the case at bar. In that case, the parties had no standing to attack directly the divorce decree. The suit involved a petition for modification of a divorce decree. In the proceedings before the Court it became apparent to the Judge on the facts as presented by both parties that neither party resided in the State of Alabama at the time the divorce decree was rendered. The Court stated that:

> "Irrespective of whether the plaintiff is in a position to attack the decree awarding alimony to the defendant, such decree cannot stand because we have repeatedly held that where a void decree is brought to the attention of a Court, it is the duty of the Court on its own motion to vacate the same.

Hardigan, supra, at 730.

This rule has been most recently

restated by the Supreme Court of Alabama in the case of Crisco vs. Crisco, 313 So. 2d 529 (May 8, 1975), where that Court stated:

> "A court is not without jurisdiction to exercise its inherent power to set aside and vacate any time a judgment because of supervening invalidity based on fraud practiced on the Court by a party in the procurement of a judgment apparent on the face of the record.
>
> "A natural and logical extension of this proposition is the holding of this Court in Hardigan v. Hardigan, 272 Ala. 67, 128 So. 2d 725 (1961). There, in upholding the lower Court's order vacating an original divorce decree, the rule was laid down to the effect that where jurisdiction of a Court was fraudulently invoked by the parties and this fact became apparent in a subsequent proceeding, although neither party attacked the validity of the original decree which is regular on its face, the Court is empowered ex mero motu to set aside the decree.
>
> "While the facts on which Hardigan is based are restrictive, the principle subordinate to its holding is not so limited. That principle authorized the Trial Judge in the instant case, on discovery of the facts not revealed until the filing of the petition for rehearing, to correct his own motion for fraudulent use of a judicial process. We hold that the action of the Trial Court in vacating the original decree of divorce and ordering a new trial was necessary and justified in the exercise of its inherent powers to protect the integrity of its judicial proceedings."

Thus, Petitioner urges this Court to grant a Writ to review the decision of the Supreme Court of Georgia, it being clear that Alabama allows inquiry as to jurisdiction when asked to enforce its judgments. This Court, as in Johnson, supra, is the only Court available to the Petitioner to correct the erroneous interpretation of the law of a State committed by the highest Court of a sister State.

C O N C L U S I O N

For the foregoing reasons, this petition for a Writ of Certiorari shoud be granted.

Respectfully submitted,

Paul Webb, Jr.

PAUL WEBB, JR.
Counsel for Petitioner
This 9th day of March, 1977.

APPENDIX "A"

31338. KINGDON v. FOSTER.

GUNTER, Justice.

This appeal presents the issue of whether the Georgia courts must give full faith and credit to an Alabama divorce judgment that is collaterally attacked, by a person not a party to the Alabama judgment, on the ground that the Alabama court lacked subject-matter jurisdiction at the time of the rendition of the Alabama divorce judgment.

The trial court ruled, in proceedings in which each of the contesting parties had sought a summary judgment in her favor, that the collateral attack could be made, that the summary judgment evidence sustained the collateral attack, that the Alabama divorce judgment was void, that the appellant's ceremonial marriage to Mr. Kingdon was not a valid marriage, and that the appellant was therefore not the widow of the deceased, her purported husband. Summary judgment was rendered in favor of Mrs. Foster, the sole surviving child of her deceased father, Mr. Kingdon.

We have concluded that we must respectfully disagree with the trial court's judgment; we conclude that the Alabama divorce judgment is not subject to collateral attack, in the courts of either Alabama or Georgia, by a person not a party to that judgment; and the judgment below must be reversed.

Mrs. Kingdon, the appellant here, had married a Mr. Eidson in 1951. Mr. Eidson was still in life when Mrs. Kingdon married the deceased in 1968. Therefore, the validity or the invalidity of the Alabama divorce judgment, obtained in 1961 by and between Mr. and Mrs. Eidson (now Mrs. Kingdon), is crucial as to whether Mrs. Kingdon was the legal spouse of the deceased and his widow, for inheritance purposes, after Mr. Kingdon's death.

Mr. Kingdon left a will, executed before his ceremonial marriage to Mrs. Kingdon in 1968, in which he left all of his property to his only child, Mrs. Foster. Mrs. Kingdon contended that the will, executed before her marriage to Mr. Kingdon, was revoked by that marriage, and that Mr. Kingdon died intestate. Mrs. Foster

contended that the ceremonial marriage was invalid because of the invalidity of the 1961 Alabama divorce judgment, that the will was not revoked, and that Mrs. Kingdon was not the widow of her deceased father.

Mr. Kingdon died in 1974; Mrs. Kingdon sought to administer the estate of her husband whom she contends died intestate; and Mrs. Foster brought an action in equity that sought to enjoin Mrs. Kingdon's administration of the estate and sought to require Mrs. Kingdon to produce the will, admittedly in Mrs. Kingdon's possession, for probate.

Mrs. Kingdon has appealed from the judgment rendered below in favor of Mrs. Foster.

Whether Mrs. Foster can or cannot attack Mrs. Kingdon's 1961 divorce from Mr. Eidson, rendered in Alabama, is the dispositive issue in this appeal. Mrs. Kingdon, then Mrs. Eidson, filed the divorce action in Alabama; Mr. Eidson, then a resident of Georgia, filed responsive pleadings and submitted personally to the jurisdiction of the Alabama court; Mrs. Eidson's pleadings and affidavit showed her to be a resident of Alabama, and the Alabama 1961 judgment shows on its face that the Alabama court had personal and subject-matter jurisdiction in the case.

Mrs. Foster's sole attack on the Alabama judgment is based on the fact that in 1961 at the time of the entry of the judgment, or at any time prior thereto, Mrs. Kingdon (then Mrs. Eidson) was not a resident of Alabama, and the Alabama court did not have subject-matter jurisdiction for the rendition of a divorce judgment that terminated the marriage between her and Mr. Eidson.

Mrs. Kingdon's primary enumerated error here is: "The divorce decree could not be collaterally attacked in Alabama since plaintiff (Mrs. Foster) had no standing to attack said decree and thus was barred from such attack in Georgia by the Full Faith and Credit Clause of the Constitution of the United States."

In Johnson v. Muelberger, 340 U. S. 581 (1951) the Supreme Court of the United States held that when a decree of divorce cannot be attacked on jurisdictional grounds by parties who were actually before the court, or by their privies, or by strangers, in the courts of the state

in which the decree was rendered, the Full Faith and Credit Clause precludes their attacking it in the courts of a sister state.

The opinion in Johnson v. Muelberger relied on the case of Sherrer v. Sherrer, 334 U. S. 343 (1948) in which the Supreme Court said: "This court has also held that the doctrine of res judicata must be applied to questions of jurisdiction in cases arising in state courts involving the application of the full faith and credit clause where, under the law of the state in which the original judgment was rendered, such adjudications are not susceptible to collateral attack." P. 350.

In *Woody v. Woody*, 91 Ga. App. 806 (87 SE2d 222) (1955), the Georgia Court of Appeals explicitly acknowledged the Johnson v. Muelberger rule in the full faith and credit area. So far as we have been able to determine, the Johnson v. Muelberger rule has never been relied on, referred to, or cited in the opinions of this court on the issue of collateral attack upon the judgment of a sister state.

Therefore, it follows that if Mrs. Foster could not attack the 1961 divorce judgment today in the Alabama courts, she cannot attack it in the Georgia courts.

In Aiello v. Aiello, 272 Ala. 505, 510 (133 S2d 18) (1961) the Supreme Court of Alabama said, in language that was not necessary to a decision in that case, that the complaining party had no standing to collaterally attack a divorce judgment. That court said: "He was not a party to the divorce suit. We do not think he possessed, at the time the divorce decree was rendered, any right which was adversely affected by that decree. It does not appear that he stands in privity with either party to the divorce suit. He cannot derive any right from the respondent, the woman he purportedly married in 1950, because, if the 1950 marriage is void as he says it is, then no right could pass to him by a void marriage; and, if the marriage be not void, then he is still the husband of the respondent and cannot have their marriage annulled, as he seeks to have done by this suit." P. 22.

Yerger v. Cox, 281 Ala. 1, 5 (198 S2d 282) (1967) adopted and affirmed the language used in Aiello and said: "In the instant case, the allegations of the bill do not

show that the decree divorcing the Coxes was void on its face. The bill does show that the complainants are strangers to the decree, that they occupy no status and had no rights which were or could have been affected by the decree at the time it was rendered. No right attempted now to be asserted was acquired by either the complainants or their father, the second husband, prior to the rendition of the decree." P. 286.

Weisner v. Weisner, 282 Ala. 626 (213 S2d 685) (1968) followed Yerger v. Cox and denied collateral attack.

We conclude that the Alabama courts would not permit Mrs. Foster to now attack the 1961 judgment of its court; and the Full Faith and Credit Clause will therefore not permit such a collateral attack in the courts of this state.

A recent decision of the Appellate Court of Illinois, Fourth District, is in accord with what we have ruled here. In Alikonis v. Alikonis, 36 Ill. App. 3d 159, 163 (343 NE2d 161) (1976) that court said: "In the instant case defendant had no pre-existing rights at the time of plaintiff's Alabama divorce and that decree is not shown to be void on its face. That decree, therefore, would not have been subject to collateral attack by defendant in the state of Alabama."

The 1961 Alabama judgment must be accorded full faith and credit; and Mrs. Foster is prevented from attacking it on the ground that the Alabama court that rendered it lacked subject-matter jurisdiction.

Judgment reversed. All the Justices concur, except Hall, J., who concurs in the judgment only.

ARGUED JULY 14, 1976 — DECIDED NOVEMBER 23, 1976 — REHEARING DENIED DECEMBER 14, 1976.

Probate of will, etc. Fulton Superior Court. Before Judge Etheridge.

Garland, Nuckolls, Kadish, Cook & Weisensee, O. Jackson Cook, Cliffe Lane Gort, Robert W. Hassett, for appellant.

Webb, Parker, Young & Ferguson, David E. Betts, Paul Webb, Jr., Bertram S. Boley, for appellee.

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

CAROL KINGDON FOSTER, Plaintiff, vs. GEORGIA PHILLIPS KINGDON Defendant.	)	CIVIL ACTION FILE NO. C-3042

O R D E R

STATEMENT OF FACTS

The above styled case arose out of a contest that resulted in the Probate Court of Fulton County, Georgia, in regard to the question of right of inheritance from the estate of Fred William Kingdon, Jr. The Plaintiff is the only child of the deceased and took the position that the Last Will and Testament of her father should be filed for probate. The defendant took the position that the Last Will and Testament of the deceased was not applicable because of her marriage to him, that rendered the Last Will and Testament of the deceased, Fred William Kingdon, Jr., null and void.

The issue that developed upon which this lawsuit was based is whether or not defendant is a lawful wife under the laws of the State of Georgia of the deceased, Fred William Kingdon, Jr. This case came before the

Superior Court of Fulton County, Georgia, instead of being handled by the Probate Court of Fulton County, because of the decision of the Georgia Supreme Court in the case of Logan vs. Nunnelly, 230 Ga. 588 (1973), which held that a procedural attack of a foreign divorce decree could not be maintained in the Probate Court which, prior to the Civil Practice Act, could entertain such an attack.

Therefore, the above styled case is related to the proceeding of the Probate Court of Fulton County, Georgia, in which the question of inheritance is still pending.

The plaintiff filed a Motion for Summary Judgment based on deposition of the defendant and various affidavits, and the pleadings.

The facts as presented show the following:

On September 12, 1974, Fred William Kingdon, Jr. died a resident of Fulton County, Georgia. At Mr. Kingdon's death his sole and only child survived him, who is the Plaintiff in this action. On the death of Fred William Kingdon, Jr. he left a certain document purporting to be his Last Will and Testament which was executed on May 27, 1966. Under said document he bequeathed his entire estate to his daughter, Carol Kingdon Foster, and named her Executrix.

This purported Last Will and Testament of Fred William Kingdon, Jr. was in the custody of defendant who refused to offer it for probate or file it with the Fulton County Probate Court. Instead, defendant filed her Application for Letters Testamentary and

appointment as Administratix of the estate of Fred William Kingdon, Jr., alleging that he died intestate. Before the return date on defendant's application for Letters of Administration, the plaintiff filed a caveat to the application and, subsequently, on February 12, 1975, filed this equitable action.

Defendant contends that the Last Will and Testament of Fred William Kingdon, Jr. is null and void since it was executed prior to her marriage to Mr. Kingdon on June 12, 1968. Defendant did, in fact, go through a ceremonial marriage with the deceased on that date.

Prior to this ceremonial marriage that took place between defendant and decedent, the defendant had married one Harry Ragan Eidson on November 22, 1951 in Fulton County, Georgia.

On July 27, 1961, the Inferior Court of Geneva County, Alabama, entered a divorce decree in favor of defendant from Harry Ragan Eidson, which on its face dissolved her Georgia marriage to Harry Ragan Eidson. In connection with this divorce decree, defendant executed an affidavit stating that she was a bona fide resident of the State of Alabama, giving no facts to support this statement.

In obtaining this divorce, defendant traveled to the City of Roanoke, Alabama, and met with a lawyer there on two separate occasions. Defendant did not appear at the divorce proceedings in Geneva County, Alabama, nor did she ever travel to Geneva County,

Alabama, to obtain the divorce. All the proceeding papers were signed by the defendant at an attorney's office located in the City of Roanoke, Alabama.

The petition for divorce was filed in the Inferior Court of Geneva County, Alabama, on July 26, 1961, one day before the final decree was entered. At the time defendant filed said complaint in the Inferior Court of Geneva County, Alabama, seeking a divorce, she was a registered voter in Cobb County, Georgia, and under an employment contract with the City of Atlanta Public Schools, State of Georgia, for the school year beginning in the fall of 1961. Defendant testified by deposition that she was in Alabama for approximately one month and that she went to Alabama for the purpose of determining if she could find a suitable place to establish a dog kennel. If she was successful she intended to move to the State of Alabama. She further testified that she was unsuccessful in her search and did not move to the State of Alabama. She further stated that she had not established her home anywhere in the State of Alabama nor lived in any particular place in Alabama, but was constantly moving around in her unsuccessful search for finding a suitable place to establish a kennel.

The evidence further shows without dispute that defendant was enrolled as a resident student at Georgia State University during the summer of 1961, and also enrolled in the fall of 1961 as an in-State resident student. The evidence further shows, without dispute, that in order for one to qualify to be an in-State resident student at Georgia

State University during this time, one must have lived in the State of Georgia for 12 consecutive months prior to the quarter in which a student enrolled as a resident student. By her enrollment at Georgia State University as an in-State resident student, defendant was affirmatively representing to the Georgia State University that she had been a resident of the State of Georgia for 12 consecutive months prior to the time of enrollment.

Harry Ragan Eidson, the person to whom defendant was married on November 22, 1951, was alive on the day that Fred William Kingdon, Jr. married the defendant and, furthermore, Mr. Eidson was alive when the above styled action was instituted by the plaintiff against the defendant.

Immediately following the death of Fred William Kingdon, Jr., plaintiff questioned the existence of a divorce decree from Harry Ragan Eidson, and defendant, in response to this, produced a decree granted by the Inferior Court of Geneva County, Alabama. Immediately thereafter, plaintiff filed a caveat to defendant's application for letters of administration.

The plaintiff, by way of deposition, immediately sought to determine the facts surrounding the divorce decree rendered by the Court in Geneva County, Alabama. After obtaining those facts from the defendant, plaintiff promptly filed this action in the Superior Court of Fulton County, Georgia, to overturn that divorce decree.

CONCLUSIONS OF LAW

"A divorce decree obtained in a

sister State in consequence of false representations by the parties as to their residence in that State is a nullity and may be collaterally attacked in any Court of this State by any person not a party thereto who is materially and adversely affected by such decree."
Cole vs. Cole, 221 Ga. 171 (1965).

Carol Kingdon Foster, the plaintiff, is the daughter of the deceased and the sole beneficiary under his Last Will and Testament and has a material interest in the matter so that she certainly has standing to attack the Alabama divorce decree as fraudulent, inasmuch as if it be a valid decree, it effectively disinherits her against the wishes of her father. Grace vs. Carter, Exec., 207 Ga. 308.

The Supreme Court of Georgia has consistently recognized the right of parties to inquire as to the validity of foreign divorce decrees in situations involving right of inheritance of a deceased person in the determination of who are the proper heirs of the deceased. The most recent such inquiry is found in the case of Azar, Adm., vs. Thomas, 206 Ga. 588 (1950), when the Supreme Court of Georgia authorized an inquiry into the facts almost identical to the case at bar.

The Azar, supra, case involved a suit in equity brought by the Administrator of the estate of Mary A. George, deceased, seeking to cancel an alleged void marriage between the deceased and the defendant, and to recover assets belonging to the estate of the

deceased, which assets were being held by the defendant. Plaintiff, in establishing the invalidity of the 1932 marriage, introduced evidence that tended to show that a Tennessee divorce proceeding which appeared on its face to dissolve the previous marriage of the defendant was invalid because the defendant had practiced a fraud on the Tennessee Court. The Supreme Court found that the defendant was not legally domiciled in Tennessee and Tennessee relied on constructive notice in granting the divorce in an ex parte proceeding. The Trial Judge had refused to consider the evidence as to fraud in the procurement of the divorce in Tennessee and there was a judgment rendered for the defendant. The Georgia Supreme Court reversed the Trial Court, and said the following:

"A foreign decree of divorce may be collaterally attacked upon the grounds of fraud in its procurement and lack of jurisdiction without offending the full faith and credit clause of the Constitution of the United States. . ."

The case at bar involves the same type of inquiry as was expressly allowed in Azar vs. Thomas, where the Supreme Court of Georgia expressly authorized such an inquiry by a third party not in privity with the defendant or the former spouse of the defendant.

Under the decisions of this State (Cole vs. Cole, supra,) this Court clearly has authority to inquire into facts surrounding the jurisdiction of the Courts of the State of Alabama to award judgments, and if it determines that the facts are such that they

clearly show that there was no jurisdiction of the Alabama Court, to award a divorce between the parties, it is required to treat the divorce decree as void.

The full faith and credit clause of the Constitution of the United States requires that judgments of sister states can only be attacked for lack of jurisdiction when such collateral attack of judgment is authorized in the State which rendered the decision. Clearly, Alabama authorizes collateral attacks of its judgments. This fact was most recently affirmed in the case of Zeanah vs. Burger, 314 So.2d 700 at p.703 (Alabama Court of Appeals 1975), where the Court stated:

> "Without deciding whether defending a petition permit for mandamus for enforcement of a judgment by pleading want of jurisdiction as a collateral attack, we find no problem in holding that even in a collateral attack, lack of jurisdiction of the Tribunal rendering the judgment void is available as a defense."

The Alabama Supreme Court further stated in the case of Crump vs. Knight, 56 So. 625:

> "It is well settled law that every Court has full authority to determine whether or not it has jurisdiction of a subject matter in the parties presented by pleadings and evidence and if it once determines that it is without jurisdiction of the

> subject matter, it should not proceed further. Courts acting without authority can impart no validity to their proceedings and their judgments are assailable in any proceeding."

Furthermore, in the case of Dawkins vs. Hutto, 131 So. 228 (1930), the Alabama Supreme Court further stated:

> "Judgment void for want of jurisdiction is open to contradiction or impeachment in collateral proceedings."

The most often cited expression of the Alabama Courts' ability to inquire into the validity of its decrees for lack of jurisdiction is the case of Hardigan vs. Hardigan, 272 Ala. 670, 128 So.2d 725. An examination of this case reveals precisely a situation analogous to the case at bar. In that case, the parties had no standing to attack directly the divorce decree. The suit involved a petition for modification of a divorce decree. In the proceedings before the Court it became apparent to the Judge on the facts as presented by both parties that neither party resided in the State of Alabama at the time the divorce decree was rendered. The Court went on to state that:

> "Irrespective of whether the plaintiff is in a position to attack the decree awarding alimony to the defendant, such decree cannot stand because we have repeatedly held that where a void decree is brought to the

attention of a Court, it is the duty of the Court on its own motion to vacate the same."

This rule has been most recently restated by the Supreme Court of Alabama in the case of Crisco vs. Crisco, 313 So.2d 529 (May 8, 1975), where the Alabama Supreme Court stated:

> "A court is not without jurisdiction to exercise its inherent power to set aside and vacate any time a judgment because of supervening invalidity based on fraud practiced on the Court by a party in the procurement of a judgment apparent on the face of the record.
>
> "A natural and logical extension of this proposition is the holding of this Court in Hardigan vs. Hardigan, 227 Ala. 67, 128 So.2d 725 (1961). There, in upholding the lower Court's order vacating an original divorce decree, the rule was laid down to the effect that where jurisdiction of a Court was fraudulently invoked by the parties and this fact became apparent in a subsequent proceeding, although neither party attacked the validity of the original decree which is regular on its face, the Court is empowered ex mero motu to set aside the decree.
>
> "While the facts on which Hardigan is based are restrictive, the principle subordinate to its holding

> is not so limited. That principle authorized the Trial Judge in the instant case, on discovery of the facts not revealed until the filing of the petition for rehearing, to correct his own motion for fraudulent use of a judicial process. We hold that the action of the Trial Court in vacating the original decree of divorce and ordering a new trial was necessary and justified in the exercise of its inherent powers to protect the integrity of its judicial proceedings."

Since judgments are subject to collateral attack in Alabama, the constitution command of full faith and credit as implemented by Congress, requires that it be subject to such attack in any other State. Dupree vs. Duke, 375 U.S. 106, 11 L.Ed. 2d 186 (1963); State of New York, el rel Handley vs. Handley, 330 U.S. 16, 91 L.Ed. 1133.

As to the issue of whether or not defendant was domicile of the State of Alabama, it is needless to belabor the facts in this case. The facts, without contradiction, demand a conclusion that defendant never established a domicile in the State of Alabama and, therefore, the Alabama Court did not have jurisdiction to grant her a divorce decree from Harry Ragan Eidson. As was stated by the Supreme Court of Georgia in the case of Clark vs. Hammock, 228 Ga. 157 at 158, quoting an old decision of Worsham v. Ligon, 144 Ga. 707, 711:

"If a person leaves the place of his domicile temporarily, or for a particular purpose, and does not take up an actual residence elsewhere with the avowed intention of making a change in his domicile, he will not be considered as having changed his domicile."

Without contradiction defendant's testimony reveals that she went to the State of Alabama for the purpose of locating a place to establish a dog kennel which she could handle. She was unable to locate such a place and, therefore, returned to the State of Georgia. Clearly, her intention to move to Alabama was conditional and, further, she did not take up an actual residence in the State of Alabama.

Defendant asserts that the question of residence and domicile are factual ones and must be submitted to the jury and cannot be decided as a matter of law. However, the Court of Appeals in the case of Pugh vs. Jones, 131 Ga.App. 600 at 605 points out that such a rule does not apply in cases where the evidence establishes a plain and plausible case that should be determined by the Court as a matter of law. The Court goes on to state:

"Thus, in Commercial Bank vs. Pharr, 75 Ga. App. 364, 377 (43 SE2d 439) this court held that 'Although the rule is well settled in this state that domicile or residence is one of the facts for the jury in

cases where the evidence is in conflict [cit.], on the other hand, where the evidence is not in conflict, we are of the opinion that this is a question of law for this court.' See also Patterson v. Patterson, 208 Ga. 7, 13 (64 SE2d 441) where the Supreme Court held '. . .[I]f the evidence demands a finding that there has not been a change of domicile, the court may by proper instructions withdraw the question from the jury.'"

See also: Knight vs. Bond & Brother, 112 Ga. 828 (1900).

Defendant finally asserts that plaintiff is not entitled to Summary Judgment because of the doctrine of laches which bars her from attacking the foreign divorce decree. The evidence before this Court clearly shows that the defense of laches is not valid in the case at bar, since this Court knows of no more appropriate and expeditious method that could have been used by the plaintiff in raising the issues and determining the facts in the case at bar. The facts show expeditious pursuit of the claim rather than delay.

For the above stated reasons, plaintiff's Motion for Summary Judgment is granted, and consequently, defendant's Motion for Summary Judgment is denied.

WHEREFORE, judgment is granted in favor of plaintiff and this Court holds that:

(a) The divorce decree granted to defendant by the Inferior Court in Equity of Geneva County, Alabama, dated July 27, 1961, is null and void;

(b) The marriage between defendant and Fred William Kingdon, Jr. on June 12, 1968, is null, void and of no effect;

(c) Defendant is ordered to file the Will of Fred William Kingdon, Jr. with the Probate Court of Fulton County, Georgia, within thirty (30) days of this Order;

(d) The defendant is required to turn over to plaintiff all of the property and assets belonging to Fred William Kingdon, Jr. which are in her possession; and further, she is enjoined from receiving, spending, disbursing and in any way disposing of any property or assets of Fred William Kingdon, Jr. and received by defendant by virtue of being considered his wife and widow; and

(e) The Court costs of this action shall be charged against the defendant.

This, the 26th day of February, 1976.

S/ Jack Etheridge
Judge,
Fulton Superior Court, A.J.C.

APPENDIX "B"

STATUTES AND CONSTITITIONAL PROVISIONS INVOLVED

Art. IV, Sec. I of the United States Constitution:

Section 1. Full Faith and Credit.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Amendment XIV, Par. 1 of the United States Constitution.

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1738 (1948)

1738. State and Territorial statutes and judicial proceedings - Full faith and credit. --

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and the seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-1323

CAROL KINGDON FOSTER,

Petitioner,

VS.

GEORGIA PHILLIPS KINGDON,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

L. A. Weisensee
O. Jackson Cook
Robert W. Hassett
GARLAND, NUCKOLLS, KADISH,
COOK & WEISENSEE, P.C.
1012 Candler Building
Atlanta, GA 30303
Counsel for
Respondent

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STATEMENT OF THE CASE

In 1961, the Respondent, Mrs. Betty Kingdon,and Mr. Harry Ragan Eidson obtained a divorce in the Inferior Court of Equity in Geneva County, Alabama. Both parties consented to the jurisdiction of the Alabama Court but, in his answer, Mr. Eidson denied all allegations of the Complaint, including those related to domicile. The Alabama Court determined that the Respondent was domiciled in the State of Alabama and issued the divorce decree.

A few years later, the Respondent married Fred William Kingdon, Jr. The couple remained married until the death of Mr. Kingdon eight years later. In connection with probate proceedings following Mr. Kingdon's death, his

daughter sought to attack the validity of the latter marriage on the ground that Mrs. Kingdon had not been validly divorced from Mr. Eidson thirteen years previously. Mr. Kingdon's daughter contended that Mrs. Kingdon was never a resident of the State of Alabama.

The Trial Court permitted Appellant to collaterally attack the divorce decree of the State of Alabama. The Georgia Supreme Court reversed the decision of the Trial Court. The Georgia Supreme Court held that it was bound by the mandate of the full faith and credit clause of the Constitution of the United States to disallow a collateral attack by a stranger to a divorce decree in a Georgia court since the Alabama court would not permit a collateral attack. The Georgia Supreme Court held:

> "The 1961 Alabama judgment must be accorded full faith and credit; and Mrs. Foster is prevented from attacking it on the ground that the Alabama Court that rendered it lacked subject matter jurisdiction." (A-4)

SUMMARY OF ARGUMENT

The Petition for Certiorari should not be granted. The Georgia Supreme Court in upholding the validity of the judgment of its sister state properly and conscientiously followed the de-

cisions of the United States Supreme Court.

ARGUMENT

SECTION I

When both parties to a marriage participate in a divorce decree and have a full and fair opportunity to contest all issues including the question of whether the Court has jurisdiction to render the decree, the decree may not be later attacked in a second state by a stranger to the divorce unless it could be so attacked in the state rendering the decree.

In Johnson v. Muelberger, 340 U.S. 581, 95 L Ed 552 (1950), a couple residing and married in New York State appeared in a Florida court and were granted a divorce under Florida law. The husband remarried. After his death, his new wife sought a statutory one-third share of his estate under the laws of the State of New York. The daughter of the deceased husband contended that the second wife had no right to take the statutory one-third share since she could not legally have married the deceased. The daughter argued that her father had never been properly divorced in Florida since neither her father nor his first wife ever became residents of the State of Florida. In reversing the decision of the New York Court of Appeals, the

Supreme Court of the United States held that the divorce could not have been collaterally attacked in Florida and, consequently, could not be collaterally attacked in a second state. The Supreme Court of the United States stated at 586:

> ". . . the requirements of full faith and credit barring a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree." (Emphasis Added.)

The Court stated at 584:

"From judicial experience with and interpretation of the clause, there has emerged the succinct conclusion that the Framers intended it to help weld the independent states into a nation by giving judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum. The faith and credit given is not to be niggardly, but generous, full.

Local policy must at times be required to give way, such is part of the price of our federal system."

The Court stated at 585:

"One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues as well to jurisdiction of the subject matter of the parties."

The Court stated at 586:

> ". . . a state by virtue of the clause must give full faith and credit to an out-of-state divorce by barring either party to that divorce who has been personally served or who has entered a personal appearance from collaterally attacking the decree. Such an attack is barred where the party attacking would not be permitted to make a collateral attack in the courts of the granting state."

The Court held that Florida would not permit a collateral attack on the divorce decree by a stranger to the divorce. The Court stated at 588:

> ". . . late opinions of Florida indicate that the child would not be permitted to attack the divorce, since the child had a mere expectancy at the time of the divorce . . . . It is

only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause, nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them so as to affect rights or interest acquired prior to its rendition."

The Georgia Supreme Court found that the Alabama Court would not permit a collateral attack on the divorce decree presented here. Therefore, under the rulings of the United States Supreme Court, Mrs. Foster was not permitted to collaterally attack the decree in Georgia.

In Sherrer v. Sherrer, 334 U.S. 343, 92 L Ed 1429 (1948), both parties to a New York marriage participated in a Florida divorce. At the hearing in Florida, the husband argued that the Florida Court did not have jurisdiction to render the divorce decree since his wife was not a resident of Florida. Later, the first husband sought to attack the decree of the Florida Court in New York.

The Supreme Court of the United States at first distinguished this case from those cases in which both parties to

the divorce do not have an opportunity to litigate the issue of jurisdiction. The Supreme Court of the United States showed that ex parte divorces are not subject to the same protection as divorces in which both parties participated, stating at 347:

"At the outset, it should be observed that the proceedings in the Florida Court prior to the entry of the decree of divorce were in no way inconsistent with the requirements of procedural due process."

The Court went on to explain the rationale for the doctrine of res judicata, stating at 350:

"Insofar as cases originating in the Federal Courts are concerned, the rule has evolved that the doctrine of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate .... It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in Court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decisions as to jurisdiction there rendered merely retries the issue previously

determined. . . ."

"This Court has held that the doctrine of res judicata must be applied to questions of jurisdiction in cases arising in State Court involving the application of the Full Faith and Credit Clause where, under the law of the State in which the original judgment was rendered, such adjudication is not susceptible to collateral attack."

In applying the doctrine of res judicata to the divorce situation, the Court stated at 351:

". . . the requirements of Full Faith and Credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree."

The Supreme Court of Georgia correctly applied the principles set forth in Johnson v. Muelberger, supra, and Sherrer v. Sherrer, supra, Williams v. North Carolina, 325 U.S. 226, 65 S. Ct. 1092, 89 L Ed 1577 (1945), relied on in Petitioner's Brief, involves an ex parte divorce and thus is controlled by due process considerations not

present here. Durfee v. Duke, 375 U.S. 106, 84 S. Ct. 242, 11 L Ed 2d 186 (1963), also relied on in Petitioner's Brief, merely holds that the Full Faith and Credit Clause applies when parties have fully and fairly litigated a particular issue. Throughout the cases, the Supreme Court has interchangeably utilized the phrases "participation by the defendant" and "full opportunities to contest the jurisdictional issues", see Johnson v. Muelberger, 340 U.S. at 586 and Sherrer v. Sherrer, 334 U.S. at 351 and the terms "fully and fairly litigated", see Durfee v. Duke, 375 U.S. at 111. There is no distinction made between a situation in which the parties resolve an issue by stipulation or consent and when the parties resolve an issue by litigation. Here, the fact that Mr. Eidson did not vigorously contest the domicile issue does not change the fact that res judicata applies. See, e.g., Alikonis v. Alikonis, 36 Ill. App. 3d 159, 343 N.E. 2d 161 (1976) at 163.

SECTION II

The Alabama courts do not permit a stranger to a divorce decree to collaterally attack a divorce decree when the decree is valid on its face and both parties to the marriage participated in the divorce.

In Aiello v. Aiello, 133 So. 2d 18

(Ala. 1961), the husband sought to nullify his wife's earlier divorce on the grounds that at the time neither his wife nor her former husband had been residents of the State of Alabama. The husband complainant sought to annul his marriage.

The Court held that because the complaining husband had learned of possible defects in his wife's divorce more than one year prior to bringing the action, he was barred from bringing it by the defense of laches. The Court went on to say at 22:

> "The foregoing conclusion as to delay is reached under the assumption that complainant, as ostensible second husband of a party to the divorce suit, possesses standing to bring an original bill in the nature of a bill of review for the purpose of vacating such divorce decree. That is merely an assumption. He was not a party to the divorce suit.We do not think he possessed, at the time the divorce decree was rendered, any right which was adversely affected by the decree . . . ."

On the basis of the Alabama Supreme Court's decision in Aiello, the Maryland Court of Appeals in the case of Leatherbury v. Leatherbury, 196 A.2d 883 (Md. 1964) determined that if squarely presented the issue, the Ala-

bama Supreme Court would not permit a collateral attack on a divorce decree rendered when both parties were legally present. The Court stated at 886:

> ". . . there is a clear indication in Aiello v. Aiello, supra, at page 22, of 133 So. 2d, that Alabama would hold that the subsequent spouse had no standing (for lack of legal interest at the time) to attack the divorce of his present spouse."

The Maryland Court thus denied the collateral attack.

Yerger v. Cox, 498 So. 2d 282 (Ala. 1967) involved the situation presented here. The defendant there had been divorced in a proceeding in an Alabama Court. Later she had married the deceased. The children of the deceased sought to collaterally attack the divorce of the defendant for purposes of deciding inheritance rights. The Alabama Supreme Court held that the children could not be permitted to attack the prior divorce. The Court quoted from the Florida Supreme Court decision of Demarigny v. Demarigny, 43 So. 2d 442 (Fla. 1949) (the same case relied upon by the United States Supreme Court in Johnson v. Muelberger, supra) in stating at 282:

"It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right that are permitted to impeach the judgment."

The Court went on to say that any interest they sought to assert must be acquired prior to the rendering of the divorce. The Alabama Supreme Court noted that this is the prevailing view and cited cases appearing in 12 A.L.R. 2d 727, See, also, 28 A.L.R. 2d 1328, and the latter cases service to both A.L.R. annotations.

In Weisner v. Weisner, 213 So. 2d 685 (Ala. 1968), the complainant had married a woman who had previously been divorced in Alabama. The defendant woman had later married the complainant in this action. She filed a suit against the complainant for separate maintenance in the New York State Courts. The complainant sought to collaterally attack the Alabama divorce. The New York Court of Appeals held that Alabama, not New York, was the proper place where the Alabama divorce should be attacked. Consequently, the complainant filed this action in Alabama.

The Supreme Court of Alabama held that the complainant was not permitted to collaterally attack his wife's prior Alabama divorce. The Court rested its decision on Yerger v. Cox, supra, and stating, in quoting Yerger v. Cox, the following at 686:

"We hold that a collateral attack against a decree of divorce rendered in Alabama cannot be maintained in the courts where the attack is instituted against non-resident strangers to the original divorce proceedings when the decree is not void on the fact of the decision."

In effect, the Supreme Court of Alabama precluded all avenues of collateral attack on its divorce decrees in situations similar to the instant one.

The Supreme Court of Georgia cited Alikonis v. Alikonis, 343 N.E. 2d 161 (Ill. App. 1976) with approval in its opinion below. In Alikonis, a man sought to collaterally attack the prior Alabama divorce of his purported wife. The Illinois Court held that Alabama would not permit a collateral attack relying on Yerger v. Cox, supra, and Weisner v. Weisner, supra.

CONCLUSION

Page 16 of the Rules of the Supreme Court of the United States state:

"Considerations governing review on Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there

are special important reasons therefor. The following, while neither controlling nor measuring the Court's discretion, indicate the character of reasons which will be considered (a) where a State Court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions by this Court . . . ."

Here, the Supreme of Georgia has properly and conscientiously rendered a decision in accord with the decisions of the United States Supreme Court. The issue presented here has already been decided by the United States Supreme Court. The Writ Certiorari should be denied.

Respectfully submitted,

GARLAND,NUCKOLLS,KADISH,
COOK & WEISENSEE, P.C.

BY: L. A. Weisensee

BY: O. Jackson Cook

BY: Robert W. Hassett

1012 Candler Building
Atlanta, Georgia 30303
404/577-2225
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA upon Petitioner by mailing same by United States Mails, postage prepaid, to the following counsel:

Paul Webb, Jr.
David E. Betts
84 Peachtree Street, N.W.
Atlanta, Georgia 30303

Bertram S. Boley
1540 First National Bank Tower
Atlanta, Georgia 30303

This the 8th day of April, 1977.

O. Jackson Cook